13 July 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Airman Basic (E-1) ANDREW P. HALPIN, USAF, *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES Crim. App. Dkt. ACM S31805 USCA Dkt. No. 12-0418/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUES PRESENTED

I.

WHETHER TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT AMOUNTED TO PROSECUTORIAL MISCONDUCT.

II.

WHETHER THE MILITARY JUDGE PREJUDICIALLY ERRED WHEN HE FAILED TO STOP TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT OR ISSUE A CURATIVE INSTRUCTION.

III.

WHETHER TRIAL DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN HE FAILED TO OBJECT TO TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3) (2006).

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF THE FACTS

The United States adopts the stipulated facts as listed in Prosecution Exhibit 1. (J.A. 184-87.) Additional facts necessary to the disposition of the case are articulated in the argument below.

SUMMARY OF THE ARGUMENT

Appellant's request for relief should be denied because: (1) trial counsel's argument was proper in that it referenced facts in evidence or reasonable inferences drawn therefrom; (2) even if this Court determines that portions of trial counsel's argument was improper, there was no prejudicial error in the military judge not stopping trial counsel's argument or giving a curative instruction; and (3) even if this Court determines that portions of trial counsel's was improper, trial defense counsel's strategic decision to address the argument in his response vice an objection provided effective assistance of counsel.

ARGUMENT

I.

APPELLANT FAILED TO MEET HIS PLAIN ERROR BURDEN IN THAT TRIAL COUNSEL'S ARGUMENT BASED BOTH ON THE EVIDENCE AND REASONABLE INFERENCES TAKEN THEREFROM DO NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

Standard of Review

The standard of review for alleged prosecutorial misconduct is de novo. *See* United States v. Morrison, 449 U.S. 361 (1981). Failure to make a timely objection to matters raised in argument constitutes waiver in the absence of plain error. United States v. Barrazamartinez, 58 M.J. 173, 175 (C.A.A.F. 2003); United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001); R.C.M. 1001(g). In the context of a plain error analysis, Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. United States v. Humphries, 71 M.J. 209 (C.A.A.F. 15 June 2012).

Law and Analysis

Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996). In Smith v. Phillips, 455 U.S. 209, 219 (1982), the Supreme Court opined that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Accordingly, courts should

gauge the overall effect of counsel's conduct on the trial itself, and not counsel's personal blameworthiness. Id. at 220.

The absence of a defense objection is some persuasive measure of the minimal impact the prosecutor's remark had on the members. Gilley, 56 M.J. at 123. Whether the comments are fair must be resolved when viewed within the context of the entire court-martial. Id. at 121. It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1979).

Trial counsel is charged with being as zealous an advocate for the government as defense counsel is for the accused. United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R.), *pet. denied,* 23 M.J. 266 (C.M.A. 1986). Trial counsel may strike hard blows but they must be fair. United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252, 256 (1956). Sterile or anemic arguments are not required in order to stay within the bounds of fair comment; blunt and emphatic language is required in most cases for effective advocacy. United States v. Turner, 17 M.J. 997, 999 (A.C.M.R.) *pet. denied,* 19 M.J. 17 (C.M.A. 1984). Where argument is directly related to legitimate concerns on sentencing, the fact that it evokes strong emotions does not make it improper. United States v. Williams, 23 M.J. 776, 779 (A.C.M.R. 1987).

In this case, trial counsel reiterated facts in evidence and argued reasonable inferences why Appellant acted the way he did and then reminded the members they will never know why he committed these crimes. (J.A. at 148-55.) Trial counsel has a right to show how aggravating the facts are in a case and damaging words are not "foul blows" when supported by the evidence. Appellant knew his wife overdosed and that she could not walk or talk. Yet, he shamefully did not take her to a hospital and did not call for help. Instead, the evidence showed he took her home to be alone, with the reasonable inference being that he was only selfishly concerned with her dying in his apartment. Ms. CH testified that while Appellant was at her house that night, he left her laying there begging him not to leave. Appellant admitted that he covered her with his jacket, looked for statue his grandmother gave him, and then left knowing his wife was in danger and what an overdose could do. (J.A. at 60-63.) Despite Appellant's attempts to make it seem as though his conduct was the result of not knowing "what the hell to do," the record paints an entirely different picture. (J.A. at 135.) The day after Appellant left his wife alone in their house, he made no effort to check to see if she had in fact "slept it off." Rather, while Ms. CH was rushed to hospital after being found by a friend, Appellant was having sex with another Airman. (J.A. at 184-86.) Based on the evidence,

it is reasonable, relevant and permissible to argue that Appellant did not care if his wife died.

Appellant complains the trial counsel improperly argued as a factual matter Appellant may have had ulterior motives. (App. Br. at 8.) Trial counsel's argument did not imagine new facts, but was simply a reasonable characterization of the evidence. Appellant takes a selective sampling of trial counsel's statements out of context to make them seem impermissible. These statements, taken from a 16-page argument, are not even "hard blow[s]," let alone "foul one[s]." *See* United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005); (J.A. at 143-59).

For example, Appellant asserts that trial counsel's incorporation of a theme was an attempt to argue for a greater offense when a complete reading of trial counsel's argument demonstrates that he was merely putting the pieces of evidence together:

> When [Appellant] finally decides to leave that night, CH emerges from the bedroom one last time. She begs him not to go and then she collapses on the couch. [Appellant's] response is to pick her up, carry her back in the bedroom, lay her in the bed and put his Air Force jacket on her. You heard from CH that she had kept her ring in her purse but somehow that ring got placed on her fingers [sic] as well. And then there were those pill bottles. The pills that she had, prescription medication, everything else in the house that she had kept in medicine cabinets, that she had kept in the kitchen cabinets, all those pills somehow ended up

> lined up in a neat little pile on her dresser. Think about that for a second.
>
> Now, there are no eyewitnesses to show that [Appellant] did that but it sure sounds like someone is trying to stage a scene, a scene of a grieving wife, pinning after her estranged husband, alone, wearing her wedding ring, wrapped in his jacket, taking a slew of pills. Members, a scene like that would most likely go to show that he wasn't involved in that event.

(J.A. at 148.)

Trial counsel identified facts that were in evidence and then merely attacked the credibility of Appellant's claim of ignorance. The evidence properly supported this reasonable inference.

Likewise, with regard to Appellant's claim that trial counsel invoked his personal opinion, the record shows that trial counsel was not interjecting his personal opinion or belief as to the nature and extent of the evidence.[1] *Compare* United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977)(error when trial counsel expressed personal opinion about appellant's guilt), *with* United States v. Winters, 18 M.J. 609 (A.F.C.M.R. 1984)(although trial counsel used phrases "I suggest" and "I find," the tenor of the summation argued only reasonable

[1] The singular arguable exception to this is when trial counsel commented on Appellant's mother's testimony stating, "Now you saw his mom up on the stand, you know, I thought she did a great job up here and you could see that there is a lot of love and affection between mother and son." (J.A. at 149, lines 8-10.) Certainly, trial counsel's comment here was to the benefit of Appellant rather than being prejudicial in any way.

inferences from the evidence). Simply using a personal pronoun when addressing the court members is not improper. *See* United States v. Martin, 36 M.J. 739, 742 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 481 (C.M.A. 1994). On the contrary, trial counsel's use of the pronoun "I" was fair comment on Appellant's attempts to minimize the impact of his criminal activity and maximize his own mental health problems and credibility.

Certainly, it can reasonably be inferred by the evidence of Appellant's actions on 26 November 2009, that he did not want people to know that he was involved with his wife's suicide attempt or taking her home and leaving her alone. During his guilty plea, Appellant stated he knew Ms. CH was suffering from a "large overdose" based on her behavior, but he still made a decision to take her to another location where she would be alone. (J.A. at 74.) He did not call for help even after his mother told him he should do so, and he did not tell anyone in the days that followed. (J.A. at 184-87.) He even told Office of Special Investigation agents that he thought his wife might die. (Id.) Ms. CH testified that she did not know how her ring got back on her finger, why Appellant's jacket was covering her or who put the medicine bottles on her night stand. (J.A. at 90-91, 184-87.) It was reasonable to infer from the facts in the record that Appellant played a role in these actions.

Perhaps the most damaging evidence against Appellant's attempt to paint the picture of an ignorant husband is the stipulation of fact. (J.A. at 184-87.) Trial counsel properly argued facts surrounding the crimes Appellant committed as stated in the stipulation of fact, which Appellant agreed were true. (Id.) Appellant, along with his trial defense counsel, signed the stipulation on 8 June 2010. (J.A. at 30, 184-87.) Appellant knew that he was admitting to the truth of the contents of the stipulation of fact and if entered into evidence they would constitute uncontradicted facts of his case. (Id.) Appellant and his trial defense counsel also knew the stipulation of fact would be used to determine an appropriate sentence. (J.A. at 31, 184-87.) Appellant re-read the stipulation of fact at the request of the military judge and specifically agreed under oath that the matters contained therein were true and he wished to admit they were true. (J.A. at 32-33.) The stipulation states, among many things:

> [Appellant] wrongfully used Adderall, a Schedule II controlled substance on multiple occasions. The Adderall was prescribed to his wife, CH, and [Appellant's] use of her prescription drug occurred without her consent. Among his uses, [Appellant] used with another airman, A1C Stephen Hodges, on more than one occasion.

(J.A. at 184.)

Notwithstanding his uncontested stipulation, Appellant now claims that trial counsel's reference to this point was improper argument on uncharged misconduct. (App. Br. at 13.) The issue of Appellant having shared his wife's medication was already before the members by virtue of Appellant's stipulation and guilty plea. The reason he shared the medication was significantly relevant to attack Appellant's credibility. Trial counsel's argument that Appellant did not want anyone to know about his involvement that night or be connected to Ms. CH is clear from the record and in direct response to Appellant's efforts to minimize his culpability.[2]

Indeed, several of Appellant's complaints with regard to trial counsel's sentencing argument are simply a continued effort to paint a different picture of himself than that clearly reflected in the record. For instance, Appellant mistakenly claims trial counsel's argument that Appellant was not revered by his supervisors was not a fact in evidence. (App. Br at 12.) However, Appellant received numerous disciplinary actions from his commander and his supervisors. (J.A. 191-214.) Appellant

[2] In addition to serving as proper context for Appellant's crimes, trial counsel's argument was commenting upon properly included evidence in aggravation. Evidence in aggravation includes "evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." R.C.M. 1001(b)(4). As noted in United States v. Hardison, 64 M.J. 279, 282 (C.A.A.F. 2007), the connection required between aggravation evidence and the crime at trial must be direct and "closely related in time, type, and/or often outcome."

also pled guilty to numerous violations of a command-directed no contact order. (J.A. at 29.) Appellant received an Article 15 for being absent without authority from his place of duty and a vacation action for failure to show up for work. (J.A. at 191-93, 196-97.) Appellant received an Article 15 for underage drinking. (J.A. at 198-201.) He received a Letter of Reprimand and two Letters of Counseling for failure to show up for work. (J.A. at 204-209.) Appellant's supervisor also gave him a Letter of Counseling for failing his Career Development Courses and a Letter of Counseling for failing inspection of his dorm room. (J.A. at 210-13.) Appellant's statements about his work ethic and supervision opened the door for trial counsel's comparison to the disciplinary actions Appellant received. (J.A. at 152-54.) In the end, Appellant's unsworn statement did not reflect the evidence in the record, and trial counsel properly commented on its lack of credibility. Moreover, trial counsel's argument, which clearly articulated that the significance of this evidence, was to show Appellant's lack of rehabilitative potential and was completely proper.

Finally, Appellant argues that trial counsel blurred the distinction between a punitive discharge and an administrative discharge. (App. Br. at 11.) Simply put, trial counsel arguments made no such reference to an administrative discharge. To the contrary, Appellant told the members during his unsworn

statement that "after I failed my second CDC I was told that I was being discharged from the Air Force." His mother also testified about "him getting discharged from Air Force." (J.A. at 130, 132.) Based on these statements, the military judge gave a Friedmann[3] instruction that the members could not consider any discretionary actions that may be taken by the chain of command. (J.A. at 140.) The defense appropriately did not object to the instruction being given. (J.A. at 141.)

Nevertheless, on appeal Appellant claims that the line between forms of discharge was blurred and mistakenly cites United States v. Motsinger, 34 M.J. 255 (C.M.A. 1992) to support his faulty assertion. (App. Br. at 11.) Motsinger is an example of trial counsel improperly blurring the line between a punitive discharge and an administrative discharge. In that case, trial counsel stated that the accused "forfeited a right to continue service in the Air Force." Motsinger, 34 M.J. at 256. Trial counsel repeatedly referenced retention by stating, "if you retain her and send her back to her unit . . ." and, "If you retain her in the Air Force . . ." Id. at 256-57. Moreover trial counsel expressly linked a punitive discharge and administrative discharge stating, "[a]nd if you retain her, if you do not give her a bad conduct discharge, then that means that she is going to be working for somebody somewhere in the

[3] United States v. Friedmann, 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

Air Force." Id. at 256. The Court found that to the extent trial counsel blurred the line between administrative separation and a punitive discharge, it was error. Id. at 257.

Here, trial counsel did not even come close to the line of blurring retention and a punitive discharge in the case at bar. Trial counsel appropriately argued for a bad conduct discharge as **punishment** based on the grossly aggravating nature of Appellant's misconduct, including the fact that he continued to commit misconduct after receiving an order from his commander and his overwhelming disregard for the welfare and safety of his wife. As stated above, trial counsel argued from the facts and reasonable inferences of the evidence. Trial counsel then argued a punitive discharge was required because a severe **punishment** was warranted. (J.A. at 155-58.) Trial counsel justified the need for a severe **punishment** by discussing the deliberate nature of Appellant's criminal acts. (J.A. at 151.) He correctly pointed out that Appellant earned the severe consequences of a punitive discharge, which include the removal of benefits. (J.A. at 156.) Trial counsel argued that a punitive discharge was appropriate **punishment** to enforce good order and discipline in the military. (J.A. at 150.) Unlike

the counsel in Motsinger, trial counsel never argued retention in his argument.[4]

It is well settled that when reviewing an argument, the focus must be contextual. As this Court stated, "the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation but the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (citing United States v. Young, 470 U.S. 1, 16 (1985)). Appellant takes selective words in isolation and then hypothesizes what they "seem" to indicate or assigns a "de facto" meaning that is simply not present in the argument, all in an effort to conjure up error where none exists.

Even assuming arguendo there was error, Appellant simply cannot meet his burden in a plain error analysis. Trial counsel's arguments in response to evidence in the record and reasonable inferences drawn therefrom did not amount to plain or obvious error. Nor did any of the arguments individually or in total materially prejudiced any substantial right. Trial counsel's argument was proper and ethical and Appellant's claim

[4] Appellant references an excised phrase within a sentence of trial counsel's argument stating Appellant should not have "the privilege of wearing this uniform. . ." (App. Br. at 12.) Evaluating the entire sentence, paragraph and argument reveal that this phrase viewed in context is entirely proper. Trial counsel said, "Consequently, he should be **punished** by having neither the privilege of wearing this uniform nor an honorable service record. A BCD is absolutely appropriate." (J.A. at 156.)(emphasis added) This is a fair comment on why the punitive discharge was an appropriate **punishment**. *See* R.C.M. 1003(b)(8)(C)

is regrettable and without merit. Accordingly, this Court should affirm the findings and sentence.

II.

TRIAL COUNSEL PROPERLY ARGUED THE AGGRAVATING EVIDENCE, AND NO CURATIVE INSTRUCTION WAS REQUIRED. EVEN ASSUMING THAT TRIAL COUNSEL'S ARGUMENT WAS IMPROPER, APPELLANT FAILED TO MEET HIS BURDEN TO SHOW THAT THERE WAS PLAIN ERROR.

Standard of Review

"Failure to object to an instruction or to omission of an instruction before members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error." R.C.M. 1105(f); United States v. Gonzalez, 33 M.J. 875, 876 (A.F.C.M.R. 1991). To prevail under a plain error analysis, an appellant has the burden of persuading this Court that: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." Humphries, 71 M.J. at 209.

Law and Analysis

Appellant next attempts to assert that the military judge committed plain error because arguing he had sua sponte duty to interrupt trial counsel's allegedly improper argument. (App. Br. at 18.) As stated above, trial counsel's arguments stemmed either directly from the evidence or reasonable inferences. They were not error, plain or otherwise.

To support his claim, Appellant cites United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977) and United States v. Rhodes, 64 M.J. 630 (C.A.A.F. 2007) in his brief. (App. Br. at 18.) The facts in Knickerbocker are substantially different from Appellant's case. In Knickerbocker, the accused was convicted of arson and breaking restriction, which was unrelated to the arson charge. Id. at 128. During findings argument, the trial counsel made numerous comments about how he personally viewed the evidence against the accused and that trial counsel believed the accused was guilty of arson and, therefore, must be guilty of breaking restriction. Id. The Court concluded that the trial counsel interjected his own beliefs throughout his argument while intertwining two separate crimes that were committed at different times. Id.

Appellant's case is also drastically different from Rhodes. In Rhodes, which was a rehearing, the appellant stated in his unsworn that he had already served 10 months confinement. The government then put in the original sentence based on more charges during its rebuttal case. Id. The original sentence was based on additional charges not before the members at the rehearing. Id. Trial counsel used the prior sentence and the fact the accused was a Security Forces Airman as evidence in aggravation. Id. The Court ruled that it was improper to allow

the accused's duty position and the prior sentence as evidence of aggravation. Id. at 634.

Appellant has not articulated how Knickerbocker or Rhodes are applicable to his case. In Appellant's sentencing case, trial counsel did not prejudicially comment on his opinion of the evidence. He argued the facts in evidence and how those facts warranted a specific sentence. Appellant has failed to point out any portion of trial counsel's argument where he told members what he personally thought about the evidence. Appellant's case is not a rehearing and trial counsel did not argue to increase Appellant's sentence because of his career field in the Air Force. Further, Appellant does not sufficiently point to anything in the record where trial counsel used facts not evidence or reasonable inferences drawn from facts not in evidence, which would create impermissible argument under either Knickerbocker or Rhodes.

Appellant also misapplies R.C.M. 1005, which states that required instructions include the maximum sentence, the members' responsibility to choose an appropriate sentence, the procedures for deliberating and voting, and that members should consider all mitigating and aggravating evidence presented in findings and sentencing. A curative instruction is not required under R.C.M. 1005. Rather, it addresses what instructions are mandatory for all sentencing proceedings. Appellant has not

provided the Court with anything in the record that required the military judge to sua sponte instruct the members.

Even if this Court finds error, there is no plain error in Appellant's case. When looking at trial counsel's entire sentencing argument, none of his statements were so egregious as to prejudice any of Appellant's substantial rights. At its most basic level, in light of the overwhelming evidence previously discussed in Issue II, the absence of prejudice is clear.[5] Put simply, Appellant's claim is without merit.

III.

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006).

[5] Appellant essentially argues that trial counsel's arguments should be viewed as prejudicial because this was a member's sentencing case. He asserts that members are "not trained in the law, do not know the difference between proper and improper arguments and can easily be misled." (App. Br. at 15.) This argument fails to recognize two key points. First, this panel of members included the O-6 president and an O-5 in addition to the three company grade officers. (J.A. at 79.) Common sense dictates and the record illustrates that the O-3 trial counsel did not "easily mislead" this seasoned officer member panel, including two field grade officers, in the presence of the military judge, trial defense counsel, and Appellant. Second, the military judge specifically instructed the members that "arguments of counsel and their recommendations are only their individual suggestions and may not be considered the recommendation or opinion of anyone other than such counsel." (J.A. at 175.) This instruction provides clear direction to the members not to walk blindly alongside a particular counsel's viewpoint, whether presented from trial or defense counsel.

Law and Analysis

Appellant completes his trifecta by maligning the trial counsel, the military judge, and now the trial defense counsel. The Sixth Amendment guarantees the right to effective assistance of counsel. This Court analyzes claims of ineffective assistance of counsel under the test outlined by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). *See* Paxton, 64 M.J. 484, 488 (C.A.A.F. 2007.) Under Strickland, an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Tippit, 65 M.J. at 76 (quoting Strickland, 466 U.S. at 687).

When reviewing claims of ineffective assistance of counsel, military courts have adopted a three-part analysis:

> 1. Are the allegations made by Appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers?
>
> 3. If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the

> factfinder would have had a reasonable doubt respecting guilt?

United States v. Tharpe, 38 M.J. 8, 10-11 (C.M.A. 1993) (internal citations and quotations omitted).

An appellant who alleges ineffective assistance of counsel "must surmount a very high hurdle." Perez, 64 M.J. at 243 (citations and quotation marks omitted). As a general matter, "[this Court] will not second-guess the strategic or tactical decisions made at trial by defense counsel." United States v. Rivas, 3 M.J. 282, 289 (C.M.A. 1977); *see also* Perez, 64 M.J. at 243.

More recently, the United States Supreme Court issued its opinion in Harrington v. Richter, 131 S.Ct. 770 (2011), wherein the Supreme Court re-emphasized the high standard an appellant must overcome to establish an ineffectiveness of counsel claim on appeal. In that opinion, the Supreme Court stated:

> "Surmounting Strickland's high bar is never an easy task." **An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care,** lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. **Even under de novo review, the standard for judging counsel's representation is a most deferential one.** Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's

> assistance after conviction or adverse sentence." **The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.**

Id., 131 S.Ct. at 788 (emphasis added, internal citations omitted).

As a last ditch effort to escape responsibility for his crimes and his decision to plead guilty under the protection of his pretrial agreement, appellant launches an absolutely meritless attack upon his trial defense counsel. For reasons extensively outlined in Issue I above, Appellant wholly fails to meet the first prong of the Strickland analysis. That is to say, there was no error. Trial counsel's argument may have been damaging to Appellant's attempt to minimize responsibility for his crimes, but it was permissible and proper. Trial counsel argued facts in evidence or reasonable inferences. Further, Appellant's defense counsel, Capt O, made a strategic decision to counter trial counsel's portrayal of facts in his own sentencing argument. (J.A. at 228.)

Even assuming arguendo that Appellant is correct, the prejudice prong requires an appellant demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. Appellate courts are not required to apply the test for ineffective assistance of counsel in any particular order. United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008)

(citing United States v. Quick, 59 M.J. 383, 386 (C.A.A.F. 2004)). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Gutierrez, 66 M.J. at 331. (quoting Strickland, 466 U.S. at 697).

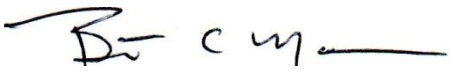
In this case, the evidence was so aggravating that even assuming trial defense counsel's failure to object was error, there was no prejudice to Appellant. In addition to the facts outlined above, Appellant's wife testified that when Appellant tried to commit suicide on two occasions, she had been there to support him. (J.A. at 126.) She described how she was worried for his safety and welfare and stood by him. (J.A. at 124-26.) She had also arranged for his mother to travel to Davis Monthan Air Force Base to support him. (Id.) When asked if Appellant ever visited her in the hospital, she said she "felt abandoned." (J.A. at 126.) Rather, by Appellant's own admission, while his wife was in the hospital, he had sex with another Airman on numerous occasions. (J.A. at 186.) The egregious facts alone in this case more than justify Appellant's sentence.

In sum, Appellant has totally failed to carry his heavy burden. As the record makes clear, trial counsel's arguments were permissible and Appellant benefited from his trial defense counsel's representation. Appellant received effective assistance from his defense counsel. Appellant has failed to

meet his very high plain error burden and his very high ineffective assistance of counsel burden and his claim should be denied.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.



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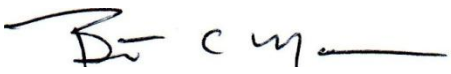
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 13 July 2012.



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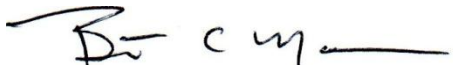
COMPLIANCE WITH RULE 24 (b) and (c)

1. This brief complies with the page and type-volume limitation of Rule 24(b) because the brief is 24 pages and 4,879 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with 10 characters per inch using Courier New.



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Date: 13 July 2012